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In the Supreme Court of the United States

OCTOBER TERM 1974

NO. 74-974

CHARLES ROBERTSON, a/k/a CHARLIE ROBERTSON, a/k/a MR. CHARLIE, HOWARD PINDER, SR., ANNIE McCRAY, DEAN LUCAS, AND DONALD ROBERTSON, a/k/a DONNIE ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NICHOLAS J. CAPUANO
Attorney for Petitioners
19 West Flagler Street
Miami, Florida 33130

SHELBY HIGHSMITH and SIDNEY A. SOLTZ, *of counsel*

MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM 1974

NO. _____

CHARLES ROBERTSON, a/k/a CHARLIE ROBERTSON, a/k/a MR. CHARLIE, HOWARD PINDER, SR., ANNIE McCRAY, DEAN LUCAS, AND DONALD ROBERTSON, a/k/a DONNIE ROBERTSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 15, 1974, rehearing having been denied on January 10, 1975.

CITATIONS TO OPINIONS BELOW

The Decision and Opinion of the Fifth Circuit is found in Appendix A hereof, and is reported in ____ F.2d 984, the letter advising counsel of the denial of the Petition for Rehearing is found in Appendix B hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1974. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

CAN A FACIALLY INVALID APPLICATION AND ORDER FOR AN ELECTRONIC INTERCEPTION PURSUANT TO 18 U.S.C., SECTION 2516 BE VALIDATED BY FACTS NOT KNOWN TO EITHER THE APPLICANT OR THE COURT AND NOT DISCOVERED UNTIL LONG AFTER THE ISSUANCE OF THE ORDER FOR THE ELECTRONIC INTERCEPTION?

II.

WAS THE CONVICTION OF CONSPIRACY A DUPLICATION OF THE CONVICTION IN VIOLATION OF 18 U.S.C., SECTION 1955 SO AS TO REQUIRE THAT THE CONSPIRACY CONVICTION BE REVERSED?

STATUTES INVOLVED

The statutory provisions involved are Title 18 U.S.C., Sections 1955, 2516 and 2518 which are printed in Appendix C, D and E, respectively hereof.

STATEMENT OF THE CASE

On the 18th day of November, 1971, Assistant United States Attorney GEORGE KOKUS appeared before the Honorable James Lawrence King, Judge, United States District Court for the Southern District of Florida, with an application for an Order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code. At the same time, FBI Agent KEITH UNDERWOOD appeared before the Honorable James Lawrence King and executed an Affidavit in support of said application. The Court, pursuant to said application and Affidavit and relying on the statements as set forth therein on that date, entered an order authorizing the interception of wire communications between the Defendants herein from telephone number 813-763-2032, a telephone subscribed to by the Defendant, HOWARD PINDER, SR., and located in his premises in Okeechobee, Florida.

As a result of the intercepted wire communications a search warrant was subsequently issued and searches were conducted of various premises occupied by the Defendants herein and of the Defendants. Subsequently the Defendants were indicted by a Grand Jury in Miami, Florida.

In the application for the interception order Mr. Kokus stated that he had been authorized by the **Acting**

Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Petersen, who had been specially designated in the proceeding by the Attorney General of the United State, the Honorable John N. Mitchell, to apply to the Court for an interception order, and the Court, pursuant to the application and Affidavit and relying on this representation entered its order herein stating as follows:

> "WHEREFORE, it is hereby ordered that:
>
> Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized by the **acting** Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Petersen, who has been specially designated in the proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to . . ."

The "authorization" from Mr. Mitchell to Mr. Petersen was dated November 15, 1971 in the form of a memo which stated "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise those powers for the purpose of authorizing GEORGE A. KOKUS to make the above described application" and pursuant thereto Mr. Petersen, the "Acting" Assistant Attorney General, sent a letter to Mr. Kokus wherein he stated "Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General

of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications to and from the facility described above, for a period of fifteen (15) days."

Subsequently on the 18th day of February, 1972, in connection with another case pending before the United States District Court for the Southern District of Florida, the Attorney General of the United States, John N. Mitchell, submitted an Affidavit wherein he stated among other things that although Section 2516 of Title 18, United States Code, permitted him to designate an Assistant Attorney General to authorize applications for wire interceptions without his approval, he never chose to make such designation and he further stated that since November 20, 1971, he has personally authorized all applications for interception orders pursuant to Title 18, United States Code, Section 2516.

Mr. Mitchell was subpoenaed to appear before the Honorable William Mehrtens, Judge, United States District Court, for an evidentiary hearing regarding the procedures followed by him and the United States Department of Justice in approving wire communication interception and the transcript of said hearing has been made a part of this proceeding. In said hearing Mr. Mitchell not once in connection with the numerous cases that he was testifying about, had any independent recollection of any of his actions regarding those cases. Further, at said hearing, when Mr. Mitchell was asked whether or not he had any recollection of determining

the question of "need" stated, "I am sure that the matter of need was inherent in the picture in all of the cases I have examined."

The Defendants also filed a Motion to Dismiss the conspiracy count based upon the rationale of Wharton's Rule, which motion was also denied by the Court.

The Defendants then appealed to the United States Court of Appeals for the Fifth Circuit and the Court of Appeals affirmed the convictions of the Defendants.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the allowance of the writ are as follows:

First: The first issue involved raises a substantial and important question of Federal constitutional law and appears to be in direct conflict with the dicta of this Court in **United States v. Chavez,** 94 S.Ct. 1849 (1974).

Second: The question raised by issue number 2 is presently pending before this Court in the case of **Iannelli v. United States of America,** Docket No. 73-64, certiorari granted May 28, 1974.

The issue involved in this petition concerns a substantial question of law, of major significance, the adjudication of which is known to be currently pending in both the Sixth and Third Circuits in **United States v. Vigi,** 350 F.Supp. 1008 (1972), assigned No. 74-1748 of the Sixth Circuit, and **United States v. Acon,** 377 F.Supp. 649 (1974), Third Circuit No. 74-1766. The Acon case had been as-

signed for oral argument on December 12, 1974. In Vigi, briefs of all parties have been filed, but at present no date has been assigned for oral argument.

Likewise, an appeal is also pending in the Fifth Circuit in **United States v. Bryan Roberts, John Joseph, et al,** [5 Cir. No. 74-1156], involving this identical issue, the argument on which had also been scheduled for December 12, 1974, at Houston, Texas.

Additionally, notices of appeal have been recently filed in two cases decided by the United States District Court for the Eastern District of Louisiana, posing this identical issue, one from an order granting suppression, and the second from a conviction and the denial of suppression. **United States v. Maniscalco,** USDC-EDLa. 1974, on appeal, 5 Cir. No. 74-4100, and **United States v. Alfonso,** USDC-EDLa. 1974, on appeal, 5 Cir. No. 74-3776, respectively.

ARGUMENT

In **United States v. Chavez,** supra, the particular question adjudicated was, once it is established that the Attorney General in fact authorized a wiretap application, whether suppression shall be ordered in instances where the wiretap application and interception order incorrectly identify the authorizing official as an Assistant Attorney General [an official, however, holding such office by Presidential appointment and Senatorial confirmation]. In resolving this question the Chavez Court enunciated the principle that the misidentification of the authorizing official [provided he be one of those individuals designated by Congress to grant wiretap applications] does not re-

quire suppression when the Attorney General, himself, is shown actually to have authorized the application. This Chavez issue, although often misunderstood by many, is not the question under consideration in this appeal.

The Giordano (**Giordano v. United States of America** 94 S.Ct. 1820 (1974) case involved issues separate and independent from those raised in Chavez. In Chavez it was claimed that the application and order failed to comply with §2518(1)(a) and (4)(d), for which reason suppression should be granted under §2518(10)(a)(i) and §2518(10)(a)(ii). There the respondents claimed both that the communications were "unlawfully intercepted" [§2518 (10)(a)(i)] and that the interception order was "insufficient on its face" [§2518(10)(a)(ii)]. In rejecting the latter contention [§2518(10)(a)(ii)], this Court explicitly found that the interception order was not facially insufficient because:

> "Here, the interception order clearly identified 'on its face' Assistant Attorney General Wilson as the person who authorized the application to be made. Under §2516(1) he properly could give such approval had he been shown to be incorrect does not detract from the facial sufficiency of the order." [94 S.Ct. at 1855 — Emphasis supplied.]

The converse of that rule must be recognized and applied with equal force. Even though it may be subsequently shown by "after the fact" affidavits of Justice Department Officials, or otherwise, that an official clothed with the requisite statutory authority [§2516(1)] did in fact authorize the wiretap application, suppression is re-

quired where the application and interception order "on their face" identify, as the authorizing official, an individual who does not possess the requisite statutory authority to authorize wiretap applications.

Giordano considered the question whether it is necessary for suppression under §2518(10(a)(ii)) that the statutory violation charged must be of such a constitutional magnitude that it substantially and directly affected the fulfillment of the Congressional intent in enacting Title III. This Court clearly found that §§2518(10)(a)(ii) and 2518(10)(a)(iii) "plainly reach some purely statutory defaults without constitutional overtones, and those omissions cannot be deemed unlawful interceptions under paragraph (i), else there would have been no necessity for paragraphs (ii) and (iii) — or to put the matter another way, if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage." [94 S.Ct. at 1832].

In Giordano this Court further observed that "paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." [94 S.Ct. at 1832].

The effect of Giordano is that evidence must be suppressed for violations of §2518(10)(a)(ii) ["insufficiency on its face" provision] whether or not the violations substantially and directly affect the fulfillment of the Congressional intent in enacting Title III. The latter criteria is applicable only to violations of §2518(10)(a)(i).

Thus, while this Court in Giordano did not consider whether an application for, and an interception order are "insufficient on their face" in reciting that the authorizing official is an Acting Assistant Attorney General, as a consequence of which the contents of any intercepted wire communications, and evidence derived therefrom, must be suppressed under 18 U.S.C. §2518(10)(a)(ii), which is the issue posed by this appeal, it is submitted that the challenge asserted herein is a "purely statutory default" recognized by the Giordano Court to require suppression under §2518(10)(a)(ii).

The Court of Appeals, we respectfully suggest, has failed to apply the principles enunciated in Giordano and Chavez for the apparent reason that it had been misled as to the question posed. Under no concept whatever is either case authority for the principle that the contents of intercepted wire communications, and evidence derived therefrom, shall not be suppressed under §§2518(10)(a)(ii) and 2515 when the application and interception order recite that the authorizing official is an Acting Assistant Attorney General and it is shown otherwise that the Attorney General in fact authorized the application.

The panel mistakenly believed the question to be whether the Justice Department followed the requisite statutory procedures when authorizing the wiretap application [Slip Opinion, p. 987]. Those procedures, whether or not correctly employed, are of no moment whatever in resolving the actual issue raised in this appeal. The panel's concern in that area was misdirected, and we believe caused it to fall into error.

In concluding that the Supreme Court decision in **United States v. Chavez,** supra, "compels rejection of appellants' challenge" [Slip Opinion, p. 968], the Court of Appeals failed to perceive the propositions for which Chavez and Giordano stand. As we have endeavored to show, the question posed is not one directly involving Chavez. We suggest that the signal importance apparently assigned by the Court of Appeals to Justice White's majority opinion in Chavez is misplaced, as evidenced by the following language found in the panel opinion:

> "Since the misidentification of the officer authorizing the wiretap did not substantially and directly affect the fulfillment of the congressional intent behind Title III, The Court found the communications were not 'unlawfully intercepted' within the meaning of 18 U.S.C. §2518 (10)(a)(i)." [Slip Opinion, p. 988].

Chavez in fact does support the proposition that when communications are claimed to have been "unlawfully intercepted" [§2518(10)(a)(i)], in order to be suppressed, it must be shown that the basis for the claim of unlawful interception substantially and directly affected the fulfillment of the Congressional intent in enacting Title III. However, that this criteria is applicable only to those instances involving §2518(10)(a)(i) and not §2518(10)(a)(ii) has been made clear by this Court in Giordano. In concluding otherwise, the Court of Appeals erred.

CONCLUSION

In view of the foregoing reasons and also in view of the fact that issue number two herein is presently pending before this Court, it is respectively submitted that this Petition should be granted.

Respectfully submitted,

NICHOLAS J. CAPUANO

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this _____ day of _____, 1975, upon the following person by depositing four copies of same addressed to them in the United States mail with sufficient air mail postage prepaid:

Solicitor General
United States Department of Justice
Washington, D.C. 20530

_____
Of Counsel for Petitioners

APPENDICES

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 73-2996.

UNITED STATES of America, Plaintiff-Appellee,
v.

Charles ROBERTSON, a/k/a Charlie Robertson, a/k/a Mr. Charlie, Howard Pinder, Sr., Annie McCray, Dean Lucas, and Donald Robertson, a/k/a Donnie Robertson, Defendants-Appellants.

Nov. 15, 1974.

By judgments of the United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., the defendants were convicted of conspiracy to violate federal gambling statute and as well as substantive violations of statute, and they appealed. The Court of Appeals, Thornberry, Circuit Judge, held, inter alia, that despite recitals in application for wiretap authorization, wiretap evidence was not to be suppressed where it was shown that the Attorney General of the United States had himself requested authorization, that affidavit of government agent was sufficient to authorize wiretap and that it was proper to convict defendants on both conspiracy and substantive counts.

Affirmed.

1. Criminal Law —394.3

Although supporting affidavit recited that particular acting Assistant Attorney General had authorized the assistant United States Attorney to seek wiretap authorization when in fact the Attorney General himself had approved the wiretap application, wiretap evidence was not required to be suppressed because the person claimed to be authorized was only an acting Assistant Attorney General and the statute did not in its terms allow such person to authorize wiretap applications. 18 U.S.C.A. §§ 2516, 2518(10)(a)(i).

2. Telecommunications —496

Statute requiring that applications for wiretap order contain a full statement as to feasibility of use of other investigative procedures and statute requiring that judge issue order only if normal investigative procedures have failed or reasonably appear to be unlikely to succeed or to be too dangerous must be read in a common-sense fashion and are designed to assure that wiretapping is not resorted to where traditional investigative techniques would suffice; their purpose is not to foreclose electronic surveillance until every imaginable method of investigation has been unsuccessfully attempted. 18 U.S.C.A. § 2518(1)(c), (3)(c).

3. Telecommunications —496

Affidavit of FBI agent as to his previous experience in investigating gambling offenses and the difficulty of using conventional or investigative techniques to investigate bo-

lita operation was sufficient to authorize judge to determine the need for wiretap. 18 U.S.C.A. § 2518(1)(c), (3)(c).

4. Telecommunications —496

Applying common-sense reading of statute regarding need to show the improbability of success with conventional techniques to obtain wiretap authorization did not require that the FBI call in other agents for purpose of physical surveillance of bolita operations in a black neighborhood after agent's affidavit claimed he could not carry out surveillance because he was white. 18 U.S.C.A. § 2518(1)(c).

5. Conspiracy —28(1)

"Wharton's rule" affords a narrowly limited exception to principle that a conspiracy as well as the substantive offense may be prosecuted; rule provides that when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes voluntary accession of a person to a crime of such a nature that it can be aggravated by a plurality of agents, cannot be maintained.

See publication Words and Phrases for other judicial constructions and definitions.

6. Conspiracy —28(3)

Government was entitled to prosecute defendants for both conspiracy to violate federal gambling statute and for substantive violations of statute. 18 U.S.C.A. §§ 2516, 2518(10)(a)(i).

7. Gaming —63(1)

Federal statute prohibiting illegal gambling business, which is defined as including five or more persons who conduct, finance, etc. all or part of the business which has been in continuous operation for more than 30 days or has gross revenue of $2,000 in any single day, is constitutional. 18 U.S.C.A. § 1955.

Appeals from the United States District Court for the Southern District of Florida.

Before TUTTLE, THORNBERRY and SIMPSON, Circuit Judges.

THORNBERRY, Circuit Judge:

After an FBI investigation into gambling operations in the Fort Pierce, Florida area, the government charged Charles Robertson, Howard Pinder, Sr., Annie McCray, Dean Lucas and Donald Robertson with violations of the federal gambling statutes.[1] The five waived a jury trial below, and the district court adjudged them guilty of the offenses charged. They now seek to challenge their convictions on several grounds. Their primary claim is that the Court should not have considered certain wiretap evidence.[2] Appellants attack the court's decision to admit the

[1]The government charged all appellants with a conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 1955. One count of the indictment also charged appellants Pinder and McCray with a substantive violation of § 1955.

[2]Appellants conceded at trial that FBI Agent Underwood's testimony provided sufficient evidence to support a conviction. They claimed that his evidence was inadmissible because of the alleged illegality of the wiretap. Presumably the government did not have sufficient other evidence to support a conviction.

wiretap evidence on two fronts. They claim that the Justice Department did not follow the requisite statutory procedures when authorizing the application for the wiretap, and that there was no necessity to employ a wiretap in the investigation of this gambling operation. We disagree and affirm.

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510—2520, Congress detailed the procedures that the Justice Department must follow in obtaining judicial authorization to intercept wire communications. Title III requires the Attorney General or a specially designated Assistant Attorney General to approve the submission of a wiretap application to the appropriate District Court. 18 U.S.C. § 2516(1). 18 U.S.C. § 2518(1)(a) provides that the application shall include, among other information, the identity of the approving officer. Appellants contend that the Justice Department procedure in this case failed to meet the identification requirements of § 2518(1)(a), requiring suppression of the evidence obtained through the use of the tap. They base their challenge on the peculiar procedures that the Justice Department employed.

On November 18, 1971, Assistant United States Attorney George Kokus sought a wiretap authorization from the Honorable James Lawrence King of the United States District Court for the Southern District of Florida. Judge King authorized the wiretap on the premises of appellant Howard Pinder Sr. on the basis of the application and FBI Agent Keith Underwood's supporting affidavit. The application recited that Acting Assistant Attorney General Henry Petersen had authorized Mr. Kokus to seek the wiretap authorization, and that Attorney General Mitchell

had specially designated Mr. Petersen to approve the application. In fact Attorney General Mitchell himself had approved the wiretap application.

[1] We think that the Supreme Court decision in United States v. Chavez, 1974, ____ U.S. ____, 94 S.Ct. 1849, 40 L.Ed. 2d 380 compels rejection of appellants' challenge. In Chavez the application recited that the Attorney General, pursuant to 18 U.S.C. § 2516, had specially designated Assistant Attorney General Will Wilson to authorize the applicant attorney to seek the wiretap order. In accordance with standard Justice Department procedure, Attorney General Mitchell had actually made the decision to approve the request, but the form letter communicating this approval recited that the Assistant Attorney General was the approving officer. The Supreme Court reversed a lower court decision excluding the wiretap evidence. The Court did not sanction the Justice Department procedure, but held that since the Attorney General himself had in fact authorized the wiretap, the evidence was still admissible. Justice White's majority opinion stated: "[W]e think it cannot be seriously contended that had the Attorney General been identified as the person authorizing the application, rather than his subordinate, Assistant Attorney General Wilson, the district judge would have had any greater hesitation in issuing the interception order." ____ U.S. at ____, 94 S.Ct. at 1855, 40 L.Ed.2d at 390-391. Since the misidentification of the officer authorizing the wiretap did not substantially and directly affect the fulfillment of the congressional intent behind Title III, the Court found the communications were

not "unlawfully intercepted" within the meaning of 18 U.S.C. § 2518(10)(a)(i).[3]

Appellants attempt to distinguish Chavez on the basis that Henry Petersen was only an Acting Assistant Attorney General. Since § 2516 does not in terms allow Acting Assistant Attorneys General to authorize wiretap applications, the appellants claim the application here was facially invalid. We do not find any merit in the proposed distinction. It is true that the Supreme Court recently held that Title III does require suppression of wiretap evidence for certain nonconstitutional procedural defects. United States v. Giordano, 1974, — U.S. —, 94 S.Ct. 1820, 40 L.Ed.2d 341. The Giordano Court stated:

> Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. We have already determined that Congress intended not only to limit resort to wiretapping to certain crimes and situations where probable cause is present but also to condition the use of intercept procedures

[3]The "authorization" from Attorney General Mitchell to Henry Petersen carried a November 15, 1971 date. Mitchell submitted an affidavit to the court in another proceeding that stated that he never exercised his authority under 18 U.S.C. § 2516 to specially designate an Assistant Attorney General to authorize wiretap applications. Instead he personally reviewed almost all applications, then attached a form letter that indicated the Assistant Attorney General had approved the application. Appellants do not claim that Attorney General Mitchell did not personally review the application submitted to Judge King. *Cf.* United States v. Giordano, 1971 — U.S. —, 94 S.Ct. 1820, 40 L.Ed.2d 341.

> upon the judgment of a senior official in the Department of Justice that the situation is one warranting their use.

—— U.S. at ——, 94 S. Ct. at 1832, 40 L.Ed.2d at 360. Certainly the congressional intent is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing this extraordinary investigative measure. The district court properly rejected this attack on the wiretap evidence. See United States v. Chavez, supra —— at ——, 94 S.Ct. at 1856-1857, 40 L.Ed.2d at 392-394.

[2] Appellants also claim that the government failed to show that other investigative procedures had been tried and failed or that they would not be reasonably likely to succeed or would be too dangerous as required by 18 U.S.C. § 2518(1)(c).[4] The authorizing judge relied on the affidavit of FBI Agent Underwood to determine the need for the wiretap. Appellants challenge the sufficiency of his affidavit on the grounds that: (1) it misrepresents his

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[4] 18 U.S.C. § 2518(1)(c) provides: "Each application for an order authorizing or approving the interception of a wire or oral communication . . . shall include the following information:

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

18 U.S.C. § 2518(3)(c) requires the judge issuing the order authorizing the interception to determine "on the basis of facts submitted by the applicant that —

> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangeorus."

experience in bolita operations;[5] (2) surveillance by physical means or use of other undercover agents was possible; (3) the information sought was not essential to the investigation.

[3] We first note that §§ 2518(1)(c) and (3)(c) must be read in a common sense fashion. They are "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 1974, 415 U.S. 143, 153 n. 12, 94 S.Ct. 977, 983 n. 12, 39 L.Ed.2d 225, 236 n. 12. Their purpose "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 5th Cir. 1974, 489 F.2d 554. The provisions contemplate that "the showing be tested in a practical and commonsense fashion." S.Rep.No. 1097, 90th Cong., 2d Sess., 100 U.S.Code Cong. & Admin.News 1968, pp. 2112, 2190. We think that both the government and the authorizing judge complied with the letter and the spirit of these provisions.

Agent Underwood's affidavit stated that he had had previous experience in investigating gambling offenses, and numbers operations in particular, for the past three years. Appellants claim this statement is misleading since the agent testified at trial that this was his first numbers investigation. Yet the agent actually testified that this

[5]Bolita is another term for a numbers operation. Runners on the street collect bets, and take them to a counting house. The winning number is generally determined from an outside source such as the Puerto Rican lottery (called "Puerto Rico") or from the numbers of the winning entries in the day's races at a horse or dog track.

was the first numbers investigation directly under his command, not the first he had participated in. The affidavit was not misleading in this respect.

[4] Appellants' claim that the wiretap was unnecessary because physical surveillance was possible also fails. Agent Underwood testified that it would have been physically possible for him to institute surveillance of some of the minor figures involved. Yet he testified further that this would have been impractical because he was white, and the bolita operations were conducted in a black neighborhood. While he admitted it would have been possible to call in black undercover agents, it would have been costly and inconvenient. Applying the common sense reading of § 2518(1)(c), we do not think the statute required the FBI to call in other agents. See United States v. Kahn, supra; United States v. Pacheco, supra.

Appellants further contend that the main purpose of the electronic surveillance was to locate the source of the winning number. Since the agent testified at trial that this was non-essential information, they urge that the § 2518(1)(c) requirements are not met. But the appellants have quoted selected favorable portions of Agent Underwood's testimony. He also stated at trial that he needed the wiretap to determine the other members of the bolita operation, a clearly legitimate investigative purpose. We find the affidavit satisfied the government's burden under § 2518(1)(c). To hold otherwise would constitute unwarranted court interference with legitimate investigative discretion contrary to the congressional intent.

[5-7] Appellants' final two contentions are that the court erred in failing to dismiss the conspiracy count of the indictment under the Wharton's rule principle,[6] and that the federal criminal statute prohibiting gambling is unconstitutional. As appellants' counsel noted on oral argument, this circuit has already determined these contentions adversely to his clients. United States v. Pacheco, supra. Therefore the convictions are affirmed.

[6] "Wharton's rule affords a narrowly limited exception to the principle that conspiracy, as well as the substantive offense, may be prosecuted. That rule, as stated by the commentator whose name it bears, provides that 'when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents cannot be maintained.' 2 F. Wharton, Criminal Law § 1604, at 1862 (12th ed. 1932)." United States v. Pacheco, 5th Cir. 1974, 489 F.2d 554, 558.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

January 10, 1975

TO ALL COUNSEL OF RECORD

No. 73-2996 U.S.A. V. ROBERTSON

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ Anne G. Parent

Deputy Clerk

cc: Mr. Sidney A. Soltz
Mr. Lloyd Bates, Jr.

APPENDIX C

CRIMES AND CRIMINAL PROCEDURE

18 U.S.C. § 1955 Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used

or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

APPENDIX D

CRIMES

18 U.S.C. § 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

APPENDIX E

18 U.S.C. § 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which

the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characterestic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever

is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs.

Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communica-

tions, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-974

CHARLES ROBERTSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence obtained from a court-authorized wire interception should have been suppressed because the intercept order stated that the application for the order had been authorized by a specially designated Acting Assistant Attorney General when it actually had been personally authorized by the Attorney General. Petitioners also contend that Wharton's Rule requires reversal of their conspiracy convictions.

After a non-jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371. Petitioner Pinder was also convicted of the substantive offense of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners were sentenced as follows: Charles Robertson—execution of a sentence of confinement withheld, two years' probation, and a $5,000

fine; Donald Robertson—execution of a sentence of confinement withheld, three years' probation; McCray—execution of a sentence of confinement withheld, two years' probation, and a $1,000 fine; Lucas—committed to the custody of the Attorney General for no more than three months, imposition of sentence and confinement withheld pursuant to the Federal Youth Corrections Act (18 U.S.C. 5010(a)), and two years' probation; Pinder—$10,000 fines on both the conspiracy and the substantive counts. The court of appeals affirmed (Pet. App. A; 504 F.2d 289).

The undisputed facts establish that petitioners conspired to conduct, and that petitioner Pinder actually conducted, an illegal gambling operation, commonly called bolita. Evidence of this offense was derived in part from a court-authorized wire interception. Although the order under which the interception was conducted stated that the application therefor had been authorized by a specially designated Acting Assistant Attorney General, the application actually had been personally authorized by the Attorney General.

1. Petitioners contend (Pet. 7-11) that the evidence derived from the court-ordered wire interception should have been suppressed under 18 U.S.C. 2518(10)(a)(ii) because the order authorizing the interception was insufficient on its face. They argue that an Acting Assistant Attorney General "does not possess the requisite statutory authority to authorize wiretap applications" (Pet. 9) and that an intercept order identifying an Acting Assistant Attorney General as the person who authorized the application is therefore facially deficient. That deficiency, they claim, requires suppression of the evidence notwithstanding that the application was in fact authorized by the Attorney General.

We reject petitioners' premise that an Acting Assistant Attorney General may not, under 18 U.S.C. 2516(1), lawfully authorize an application for an intercept order. See *United States* v. *Pellicci,* 504 F.2d 1106 (C.A.

1), certiorari denied, January 20, 1975, No. 74-636. In any event, it would not follow that suppression is required. Since it is undisputed that the Attorney General actually authorized the application at issue here, it cannot be said that there was a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures" (*United States* v. *Giordano*, 416 U.S. 505, 527). As the court of appeals correctly stated, "[c]ertainly the congressional intent is satisfied when the head of the Justice Department personally reviews the proposed application and determines that the situation is appropriate for employing this extraordinary investigative measure" (Pet. App. 8). See also *United States* v. *Acon*, C.A. 3, No. 74-1766, decided March 6, 1975.

Nothing in this Court's decisions in *Giordano* and in *United States* v. *Chavez*, 416 U.S. 562, supports petitioners' contention that evidence obtained pursuant to a facially insufficient order must be suppressed "whether or not the violations substantially and directly affect the fulfillment of the Congressional intent in enacting Title III" (Pet. 9). That contention was expressly rejected by the Third Circuit in *United States* v. *Acon, supra*, a case that is indistinguishable from the present one. The court there correctly held that "(10)(a)(ii) suppression is not required for every minor insufficiency" (slip op. 10).

2. Petitioners also contend that the conspiracy conviction was a "duplication" of the substantive conviction under 18 U.S.C. 1955 and that the conspiracy conviction therefore must be reversed (Pet. 2). Only petitioner Pinder, however, was convicted of both the conspiracy and the substantive offense;[1] the other petitioners were convicted

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[1]Pinder was given cumulative fines on the two counts.

of the conspiracy alone. In any event, the contention is now foreclosed by this Court's decision in *Iannelli* v. *United States,* No. 73-64, decided March 25, 1975, which holds that a person may properly be indicted, convicted, and punished separately both for violating Section 1955 and for conspiring to commit the violation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.